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June 14, 2002

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OFFICE OF THE
EXECUTIVE SECRETARY

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition of BellSouth Telecommunications, Inc. for Approval of a Tariff
to Introduce the 2002 Key Customer Program*
Docket No. 02-00625

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth's Response to Petition for Clarification and Motion to Dismiss Complaint and Petition to Intervene. Copies of the enclosed are being provided to the Consumer Advocate Division counsel.

Very truly yours,

Guy M. Hicks

GMH:ch

POSTED
6/17/02

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Petition of BellSouth Telecommunications, Inc. for Approval of a Tariff
to Introduce the 2002 Key Customer Program*

Docket No. 02-00625

OFFICE OF THE
EXECUTIVE SECRETARY

**BELLSOUTH'S RESPONSE TO PETITION FOR CLARIFICATION
AND MOTION TO DISMISS COMPLAINT AND PETITION TO INTERVENE**

BellSouth Telecommunications, Inc ("BellSouth") filed its 2002 Key Customer Program tariff with the Tennessee Regulatory Authority ("TRA") on May 24, 2002. Not a single one of BellSouth's competitors have challenged this tariff filing in any respect. Moreover, BellSouth's tariffed 2001 Key Business Discount Program,¹ which is similar to the 2002 Key Customer Program, has been available for resale since June 26, 2001, and not a single CLEC has filed a complaint with the TRA regarding the manner in which BellSouth has made that tariffed offering available for resale. On June 4, 2002, however, the Consumer Advocate and Protection Division ("CAPD") filed a "Request for Clarification or in the Alternative Complaint and Petition to Intervene" that questions the amount that BellSouth can charge CLECs who wish to resell this tariffed offering to their end user customers.

As explained below, the methodology BellSouth uses to determine the amount that it is allowed to charge CLECs who want to resell the 2002 Key Customer Program complies with Orders issued by both the Federal Communications Commission ("FCC") and Tennessee Regulatory Authority

¹ See BellSouth's Tennessee General Subscriber Services Tariff A13.90.6.

("TRA"). The CAPD's filing, therefore, should not be allowed to thwart the opportunity for consumers in the state of Tennessee to enjoy one of the most obvious benefits of competition – lower prices that compete with the myriad offerings that are available from CLECs in Tennessee. Instead, the TRA should dismiss the CAPD's Complaint and Petition to Intervene, approve BellSouth's tariff as filed, and allow Tennessee consumers to enjoy the benefits of the vibrant competition that exists in Tennessee's local exchange markets.

I. INTRODUCTION

The 2002 Key Customer Program provides rewards to BellSouth's end users who purchase designated services from BellSouth. These rewards take the form of a credit on the customer's bill, and the amount of the credit in any given month is a designated percentage of the standard tariff rates of the services the customer purchased the previous month. Assume, for example that a BellSouth end user that elects a 36-month contract under the 2002 Key Customer Program purchases services in July, and assume that the standard tariff rates for these services is \$100. In August, that customer will receive a bill credit in the amount of \$20 (20% of the \$100 standard tariff rates for the services the customer purchased in July). Under the Key Customer Program tariff, therefore, the customer has actually paid \$80 for the services.

The issue presented by the CAPD's filing is how to go about applying the 16% resale discount rate that has been established by the TRA when a CLEC resells the tariffed 2002 Key Customer Program to an end user. The CAPD

contends that the 16% resale discount rate should be applied to the standard tariff rates for the services that the CLEC purchases for resale. BellSouth, on the other hand, correctly contends that the 16% factor must be applied to the figure that results after the standard tariffed rates for such services have been reduced by the rewards that are provided under the 2002 Key Customer Program.

To illustrate the dispute, assume that a CLEC wants to resell the 2002 Key Customer Program to an end user that elects a 36-month term under the Program, and assume that in July, that CLEC purchase services with a standard tariff rate of \$100 for resale to the end user. The CAPD contends that BellSouth can charge the CLEC a resale rate of no more than \$66 for those services. The CAPD would calculate this amount as follows

Standard Tariffed Rate of Services Resold	\$100.00
Less Key Customer Reward (20% of \$100)	(\$20.00)
Less Resale Discount (16% of \$100 Full Tariffed Rate)	(\$16.00)
Resale Rate	\$66.00

BellSouth, however, correctly contends that it is allowed to charge the CLEC a resale rate of \$67.20 for those services. BellSouth calculates this amount as follows:

Standard Tariffed Rate of Services Resold	\$100.00
Less Key Customer Reward (20% of \$100)	(\$20.00)
Retail Rate a BST End User Would Pay	\$80.00
Less Resale Discount (16% of Retail Rate)	(\$12.80)
Resale Rate	\$67.20

As explained below, BellSouth's position is the correct one because it is entirely consistent with both the resale provisions of the FCC's *Local Competition Order*² the resale provisions of the Orders entered by the TRA in the avoidable cost proceedings.

II. ARGUMENT

A. BellSouth's Methodology Complies with the FCC's *Local Competition Order*.

The federal Telecommunications Act of 1996 ("the Act") provides that resale rates shall be set "on the basis of *retail rates* charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." 47 U.S.C. §252(d)(3) (emphasis added). Like most state Commissions, the TRA has established the costs that are to be excluded from the retail rates (i.e. the "avoidable costs") as a percentage of the retail rate of the services that are being resold. This is perfectly permissible. In fact, in the *Local Competition Order*, the FCC itself established a default range of discounts that state Commissions could use on an interim basis until they established permanent avoided cost discounts on the basis of cost studies. The FCC explained that when avoided costs are determined in this manner, state Commissions "calculate the portion of a retail price that is attributable to avoided costs by multiplying the *retail price* by the discount rate." *Local Competition Order* at ¶908 (emphasis added). It

² First Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Docket No. 96-98 (August 8, 1996).

is clear, therefore, that the 16% discount rate established by the TRA must be applied to the "retail price" of the services that are being resold.

That, of course, begs the question of what "retail price" means in the context of a program that provides credits off a standard tariffed rate. Fortunately, the *Local Competition Order* provides the answer to that question. As explained in the following paragraphs, it is the reduced price – that is, the standard tariffed rate less the promotional discount or credit – that is the "retail price" to which the 16% resale discount rate established by the TRA must be applied.

In the *Local Competition Order*, the FCC addresses how incumbent LECs are required to make promotions available for resale, and it explains that it is "referring to price discounts from standard offerings that will remain available for resale at wholesale rates, i.e., temporary price discounts."³ *Id.* at ¶948. The FCC then acknowledged that there was a "question of whether *all* short-term promotional prices are '*retail rates*' for purposes of calculating wholesale rates pursuant to section 252(d)(3)." *Id.* at ¶949 (emphasis added). The FCC concluded that "short-term promotional prices do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation." *Id.*

The FCC then stated that "[w]e must also determine when a promotional price ceases to be 'short term' and must therefore be treated as a retail rate for an

³ As explained above, the Key Customer Program provides a credit that is equal to a specified percentage off the standard tariff rates for the services the customer orders, but these credits are not permanent – instead, they end at the expiration of the term elected by the customer and, therefore, they are temporary in nature.

underlying service." *Id.* at ¶950 (emphasis added). As the TRA is aware, the FCC determined that promotional prices that are available for 90 days or less are "short term" promotions that do not constitute retail rates for the underlying services. *Id.* Conversely, promotional prices that are available for more than 90 days are not "short term." *Id.* Because such promotional prices are not "short term," they "must therefore be treated as a retail rate for an underlying service." *Id.* at ¶949.

Significantly, the Eighth Circuit Court of Appeals affirmed that this is true when it stated that "the [FCC's] determination that promotional rates that are effective for more than 90 days qualify as "retail rates" *is a reasonable interpretation of the Act's terms and was not made arbitrarily or capriciously.*" See *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 819 (8th Cir. 1997), *reversed on other grounds* 525 U.S. 366 (1999) (emphasis added).

As noted above, the 16% discount rate established by the TRA must be applied to the retail rates of the service that is being resold. *Id.* at ¶908. The retail rates of the services purchased under the 2020 Key Customer Program, in turn, are the rates a BellSouth end user pays after the standard tariffed rates have been reduced by the amount of credit the end user receives under the program. In the example set forth Section I above, therefore, the retail rate is \$80 (the \$100 standard tariff rate less the \$20 credit the end user receives under the Key Customer Program). It is this \$80 retail rate to which the 16% wholesale discount rate must be applied. Accordingly, BellSouth's methodology complies with the FCC's *Local Competition Order*, and the CAPD's methodology does not.

B. BellSouth's Methodology Complies with the Orders Entered by the TRA in the Avoidable Cost Docket and in the AT&T/MCI Arbitration Proceedings.

In accordance with the federal authority discussed above, the TRA's Final Order in the avoidable cost docket⁴ provides "[t]hat the wholesale discount be, and hereby is, established as a set percentage off the tariffed rates" Final Order at 7, ¶2. In establishing this set percentage off the tariffed rates, the TRA reached the following decisions:

1. Instead of having different rates for residential, business, or other categories, one wholesale discount rate applies to all services subject to resale;
2. Instead of being set as a fixed dollar amount, *the wholesale discount is a set percentage off the tariffed rates*; and
3. Services subject to resale are bundled and include operator services and directory assistance.

See Final Order in Docket No. 96-01331 at 5 (emphasis added). As a result of that Order, the wholesale rate for any BellSouth service that is subject to resale is the tariffed rate for the service less the 16% wholesale discount.

There can be no dispute that in the example set forth in Section I above, \$80 is the tariffed rate for the services that are being resold. After all, the 2002 Key Customer Program is a *tariffed* offering, and the end user in the example elected a 36-month term pursuant to that *tariffed offering*. Under those circumstances, the 2002 Key Customer *tariff* clearly requires BellSouth to charge that end user a net

⁴ See Final Order in Docket No. 96-01331, *In Re: The Avoidable Costs of Providing Bundled Service for Resale by Local Exchange Telephone Companies*, Docket No. 96-01331 (January 17, 1997).

amount of \$80 for the services purchased in the example (the \$100 standard tariffed rates for the services less the \$20 reward). If BellSouth were to decline to provide the \$20 credits to that end user (and, therefore, charge the end user a net of \$100 for the services instead of a net of \$80 for the services), the end user undoubtedly would claim that BellSouth had violated its 2002 Key Customer Program *tariff* by charging rates that are higher than those allowed by that *tariff*.

It is clear, therefore, that in the context of the 2002 Key Customer Program, the tariffed rates to which the 16% resale discount is to be applied is the \$80 rate that the end user would pay BellSouth pursuant to that tariff, and not the standard \$100 rates that appear in BellSouth's tariffs. Moreover, as explained above, this is entirely consistent with the resale provisions of the FCC's *Local Competition Order* as affirmed by the Eighth Circuit. The CAPD's arguments to the contrary, therefore, are simply without merit.

C. The TRA Should Exercise its Discretion to Dismiss the CAPD's Complaint and to Decline to Convene a Contested Case.

The TRA is not required to convene a contested case proceeding merely because the CAPD has asked it to do so. Instead, as the Supreme Court of Tennessee has ruled, "the TRA has the power to convene a contested case hearing if it chooses to exercise the authority," and "§65-5-203(a) does not impose a mandatory duty upon the TRA to convene a contested hearing in every case upon the filing of a written complaint." *Consumer Advocate Division v. Greer*, 967 S.W.2d 759, 763-64 (Tenn. 1998)(emphasis added). As explained above,

BellSouth methodology of computing the amount that it can charge a CLEC for the resale of the 2002 Key Customer Program complies with the FCC's *Local Competition Order* and with the Order the TRA entered in the avoided cost proceedings. The CAPD's issues with this methodology, therefore, are without merit. Accordingly, the CAPD's filing should not be allowed to thwart that opportunity of the consumers of the state of Tennessee to enjoy one of the most obvious benefits of competition – lower prices that compete with the myriad offerings that are available from CLECs in Tennessee. Instead, the TRA should exercise its discretion to dismiss the CAPD's Complaint and Petition to Intervene, approve BellSouth's tariff as filed, and allow Tennessee consumers to enjoy the benefits of the vibrant competition that exists in Tennessee's local exchange markets.

CONCLUSION

For the reasons set forth above, the TRA should dismiss the CAPD's Complaint and Petition to Intervene, decline to convene a contested case proceeding, and approve BellSouth's 2002 Key Customer Program tariff as filed.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

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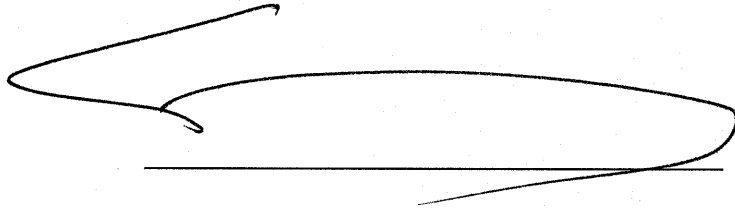
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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2002, a copy of the foregoing document was served, via the method indicated:

- ☐ Hand
- ☐ Mail
- ☒ Facsimile
- ☐ Overnight

Timothy Phillips, Esquire
Office of Tennessee Attorney General
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A handwritten signature in black ink, consisting of a large, stylized loop followed by a horizontal line and a short vertical stroke at the end.